INSTITUTE OF MAKERS OF EXPLOSIVES

The safety and security association of the commercial explosives industry.

June 6, 2003

Dockets Management System
Room PL 401
US Department of Transportation
400 Seventh St., SW
Washington, DC 20590

RE: Docket No. TSA-2003-14610 Amendment No. 1572-1[1]

Dear Sir or Madam:

On behalf of the Institute of Makers of Explosives (IME), I am submitting comments to the Transportation Security Administration's (TSA) interim final rule (IFR) that implements §1012 of the USA Patriot Act by establishing security threat assessment standards to determine whether individuals pose security threats warranting the denial of a hazardous materials endorsement for a commercial drivers license (CDL), and procedures for seeking waivers from the standards and for appealing adverse security assessment determinations. This rule is also critical to resolving jurisdictional issues concerning security risks in the handling of explosives during transportation between agencies of the Department of Justice (DOJ) and the Department of Transportation (DOT).

Interest of the IME

The IME is the safety and security association of the commercial explosives industry. Our mission is to promote safety and the protection of employees, users, the public and the environment; and to encourage the adoption of uniform rules and regulations in the manufacture, transportation, storage, handling, use and disposal of explosive materials used in blasting and other essential operations. Commercial explosives are transported and used in every state. Additionally, our products are distributed worldwide, while some explosives, like TNT, must be imported because they are no longer manufactured in the United States. The ability to transport and distribute these products safely and securely is critical to this industry.

[1] 68 FR 23852 (May 5, 2003).

Background

As enacted in 2001, the USA Patriot Act gave DOT authority to determine standards and procedures for security clearances of operators of commercial motor vehicles transporting hazardous materials. DOT, subsequently, delegated this authority to TSA while reserving related responsibilities to the Federal Motor Carrier Safety Administration (FMCSA).[2] Since that time, other statutes affecting transportation, notably the Aviation and Transportation Security Act and the Maritime Transportation Security Act, mandated similar security requirements for all modes of transportation. These authorities were delegated to TSA and the US Coast Guard (USCG), authorities which have since transferred with TSA and USCG to the Department of Homeland Security (DHS). Congress also amended Federal Hazardous Materials Transportation Law (FHMTL) to clarify that DOT's authority to provide for the safe transportation of hazardous materials includes providing for the security of that transportation.[3]

Since 1970, a provision of Federal Explosives Law (FEL) has enumerated several disqualifications applicable to a number of persons, including persons who transport explosives, a subset of hazardous materials.[4] Yet, these disqualifications were not imposed on transporters of these materials because the FEL excepts from its provisions the transportation of explosives which are regulated by DOT.[5] Late last year, Congress enacted the Safe Explosives Act (SEA), which, among other things, expanded the existing list of FEL disqualifications, but did not alter the transportation exception.[6] While the legislative history of the SEA is totally silent on the transportation exception, the FEL's implementing agency, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), determined, without notice and comment, that the FEL disqualifications as amended by the SEA were "self-implementing," that the transportation exception has never been effected for persons who may possess explosives in the course of transporting explosives in commerce, and that the only reason that the transportation community was not more aware of its compliance obligation is that ATF has not exercised its authority to enforce these requirements.

ATF's revised interpretation of FEL led to a self-imposed embargo on the transportation of commercial explosives by all North American railroads, vessel operators serving US ports, and some motor carriers. ATF stated that it had not determined whether or not DOT rules applicable to persons transporting explosives by air are adequate to effect the FEL transportation exception.[7] TSA's transfer to DHS complicated this jurisdictional issue inasmuch as the FEL transportation exception applies only to transportation regulated by DOT.

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2 68 FR 10988 (March 7, 2003).
3 PL 107-296, Section 1711.
4 18 U.S.C. 842(i)(1) – (4).
5 18 U.S.C. 845(a)(1). Provisions related to plastic explosives are not subject to the exception.
6 PL 107-296, Title XI, Subtitle C.
7 Recent Regulations Issued by the Transportation Security Administration on Commercial Transportation of Explosives, February 11, 2003. http://www.atf.treas.gov/explarson/safexpact/expltransregs.htm

In response to the disruption from frustrated commercial explosives shipments otherwise in full compliance with law caused by ATF's revised interpretation of the FEL transportation exception, DOT/TSA have exercised their statutory authorities and implemented a number of interim final rules to invoke the transportation exception for commercial movements.[8]

IME is grateful to DOT/TSA for their united efforts to address this jurisdictional issue as swiftly and comprehensively as possible. These comments address the portion of the rules implemented by TSA.

Areas of Support

IME fully supports TSA's determination that is has assessed the security risk of personnel involved in the transportation in commerce of explosive materials by air, vessel, and truck and concluded that its rules meet the US Department of Justice (DOJ) conditions to effect the transportation exception of 18 U.S.C. 845(a)(1) and thus displace ATF authority to prosecute persons under 18 U.S.C. 842(i) while they are engaged in the transportation of explosives in commerce.[9]

IME fully supports TSA's determination to rely on DOT's internationally harmonized definition of an explosive material, not ATF's definition, for purposes of identifying what materials in transportation in commerce are potentially subject to FEL authority. TSA's analysis of this issue is outstanding. Simply put, to the extent ATF's definition of "explosives" applies to materials falling in DOT hazard classes 4, 5, 9, or non-regulated materials, ATF may not apply its FEL authority while those materials are in transportation in commerce. This interpretation is fundamentally necessary to the conduct of commerce inasmuch as ATF's definition of "explosives" is not transferable to regulations governing commercial hazardous materials transportation. TSA need only evaluate the sufficiency of its regulations as they pertain to Class 1 materials for purposes of effecting the transportation exception.

IME fully supports TSA's determination to set the trigger for federal background checks of drivers engaged in hazardous materials transportation at those transporting placarded loads. TSA has determined that individuals, who may possess in the course of transportation non-placarded shipments of hazardous materials, including commercial explosives, do not pose a security risk and do not warrant federal background checks or clearance.[10] All hazmat employees, however, including transportation handlers of less than placarded loads, will be subject to the security requirements implemented in HM-232.[11] Thus, to the extent such non-placarded shipments involve commercial movements of explosives, the individuals handling these shipments do not default to ATF's personnel security checks because "the security and

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[8] 68 FR 6083 (February 6, 2003), 68 FR 23852 (May 5, 2003), 68 FR 23844 (May 5, 2003), and 68 FR 23832 (May 5, 2003).

[9] 68 FR 23854 (May 5, 2003).

[10] 68 FR 23856 and 23858 (May 5, 2003).

[11] 68 FR 14510 (March 25, 2003).

safety regimes established in this rule and the FMCSA and RSPA regulatory programs address the transportation of explosives by persons posing a security threat."[12]

IME fully supports RSPA's determination, both from a statutory and a risk assessment perspective, to apply the federal background check requirement to all placarded loads, not just placarded Class 1 shipments. A number of risk assessments of hazardous materials in transportation show that explosives do not pose the greatest threat in commercial transportation.[13]

IME fully supports, with one exception, TSA's standards to assess security threats of applicants for commercial drivers' licenses with a hazardous materials endorsement. We believe that TSA, not ATF, should set these standards for transportation. The one exception is discussed in the "Areas of Concern" section.

IME fully supports TSA's determination to use the commercial driver's license (CDL) and the hazardous material endorsement as the credential to verify that a commercial motor vehicle operator has a security clearance. The CDL has meaning only in a commercial setting. We understand that the phrase "transportation in commerce," as used by TSA, does not include the transportation of hazardous materials by private individuals in personal vehicles for personal use not in furtherance of a commercial enterprise. In short, DOT/TSA's hazardous materials authority does not cover terrorist activity.

IME fully supports TSA's determination to require renewal of a CDL requiring a hazmat endorsement every five years. We believe this is an adequate interval to reassess the qualification of hazmat drivers.

IME fully supports TSA's efforts to ensure the due process rights of drivers whose background checks may or do find disqualifying offenses. These persons are afforded rights of appeal and access to information relative to the appeal. Waivers are available to those disqualified individuals who can show that they have been rehabilitated. TSA intended to develop criteria to ensure the uniform application of the waiver process. IME supports these policies.

Issues Needing Clarification

TSA states that the preemptive effect of this IFR extends only to "State law" and "only where, among other things, the exercise of State authority conflicts with the exercise of Federal authority under the Federal statute."[14] This statement of preemptive effect raises a number of questions that deserve clarification. First, TSA's definition of "State" does not include political subdivisions of such States. There are over 30,000 political jurisdictions within the Nation's 50 States. Any of these non-state jurisdictions could impose requirements that conflict with the exercise of Federal authority. However, the IFR is silent

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[12] 68 FR 23856 (May 5, 2003).

[13] Comparative Risks of Hazardous Materials and Non-Hazardous Materials Truck Shipment Accidents/Incidents, March 2001, http://www.fmcsa.dot.gov/Pdfs/HMRiskFinalReport.pdf

[14] 68 FR 23868 (May 5, 2003).

on the preemptive effect of the rule on requirements imposed by non-state political jurisdictions. Second, the statement of preemption contains the phrase, "among other things." TSA should clarify what constitutes "other things." Clarification of the "among other things" open set phrase is particularly important as it is read with the closed set statement "only where" there is a direct conflict with Federal authority. Third, TSA, FMCSA, and RSPA's USA Patriot Act IFRs all have different statements about the preemptive effect of these rules. Such statements can only lead to misunderstanding and uncertainty as, over time, non-federal security requirements are challenged. TSA already concedes that "some States have already enacted legislation they consider necessary to carry out the mandates of [the USA Patriot Act for hazmat driver background checks]."[15] The prospect of duplicative, conflicting, or non-reciprocal non-federal background checks in light of DOT/TSA USA Patriot Act authority prompted IME to join with a number of other hazmat industry associations last year to voice concern about this issue.[16] Independent state action also prompted industry to support legislative clarification that the preemptive authority of FHMTL extends to non-federal security issues arising under FHMTL or requirements of DHS.[17] As a result of this legislative clarification, RSPA's companion rule to this IFR "preempts State, local, and Indian tribe requirements" that violate any of the preemptive authorities of FHMTL concerning background clearance of transportation workers, including drivers subject to TSA's requirements.[18] However, the preemptive authority of the FHMTL is limited to the extent that the non-federal requirement is "authorized by another law of the United States."[19] TSA's IFR should acknowledge DOT's authority under the FHMTL to prosecute applications for preemption of non-conforming, non-federal transportation worker background clearance requirements.

Even though "fingerprint" is not used in the text of the USA Patriot Act provision implemented by this IFR, we understand that a fingerprint is currently the only way for TSA to access the criminal/terrorist databases for non-criminal purposes to screen CDL applicants as required by the Act. However, the fingerprint requirement is the most costly element of TSA's background clearance protocol. Consequently, at a meeting with TSA on this rule, we specifically questioned the merit of routinely requiring resubmission of fingerprints once fingerprints had been submitted and processed.[20] At the meeting, we were told that TSA agreed with us and that resubmission of fingerprints would only be required in cases where the identity of the CDL hazmat endorsement applicant was in doubt. However, this is not the policy we read in the IFR. Instead, TSA even goes so far as the grant States authority to "require fingerprint submission prior to the expiration of [the] five years [term limit for a hazmat endorsed CDL], or on a more frequent basis than once every five years."[21] How TSA resolves this policy discrepancy has huge ramifications for the costs and acceptability of the program. If IME misunderstood TSA at the meeting and TSA fully intends that drivers routinely, and perhaps at State discretion more frequently than once every five years, submit

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15 68 FR 23868 (May 5, 2003).

16 Letter to Norman Y. Mineta, Secretary, DOT, from Cynthia Hilton & Paul Rankin, Interested Parties for HMTA Reauthorization, February 15, 2002.

17 PL 107-296, Section 1711.

18 68 FR 23841 (May 5, 2003).

19 49 U.S.C. 5125(a).

20 Meeting with Dan Hartman, TSA, and Cynthia Hilton, IME, and Julie Heckman, APA, May 5, 2003.

21 68 FR 23857 (May 5, 2003). Also see, 68 FR 23859 (May 5, 2003).

fingerprints, we oppose this requirement and request TSA to explicitly justify why fingerprint resubmission is necessary and desirable.

In its rules addressing aliens transporting explosives by truck and rail from Canada to the United States, TSA specifically established that its requirements apply to "motor private carriers."[22] TSA does not make such a direct statement in this IFR. However, there is no doubt that individuals operating commercial motor vehicles (CMV) for motor private carriers are subject to CDL requirements. IME would appreciate a declarative statement about the applicability of these requirements and subsequent effect of the transportation exception for motor private carrier CMV drivers of explosives. This is important because ATF, in its interim final rules implementing the security background requirements of the SEA, declares that truck drivers employed by private motor carriers are employees "authorized to possess explosives" subject to the FEL and the Bureau's background check requirements.[23] Should ATF's interpretation be allowed to stand, it will create a dual standard for transporter qualification and waste federal and private resources as drivers of private motor carriers are compelled to comply with both ATF and DOT/TSA security clearance requirements. The result could prompt those who know the most about the risks associated with the products they manufacture and distribute to abandon transportation-related activities.

TSA defines "alien" to mean "any person not a citizen of the United States." The USA Patriot Act uses another definition of "alien" that, along with citizens of the United States, also excludes persons who are nationals of the United States.[24] TSA's rules should be amended to be consistent with this definition.

Assuming a properly executed application, TSA estimates that it will be able to process a security clearance and issue an appropriate credential within 90 days. IME believes 90 days is a reasonable timeframe. However, what remains to be clarified is the status of a driver's credential, if for no fault of the driver, TSA is unable to complete its processing within the allotted time. If the delay in processing an applicant's security clearance does not result from concern about the applicant, TSA should issue a temporary clearance to the applicant until TSA can complete the applicant's security check.

TSA places a self-disclosure requirement on drivers with CDL hazmat endorsements to report USA Patriot Act disqualifications to the State issuing the driver's CDL.[25] However, there is no corresponding requirement for the driver to report such disqualification to his/her current employer. Yet, DOT imposes such a requirement on CDL drivers to notify current employers for convictions of certain motor vehicle traffic control violations.[26] TSA should,

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22 68 FR 6083 (February 6, 2003).

23 68 FR 13771 (March 20, 2003). On May 16, 2003, ATF posted on its web site a notice stating, among other things, that private motor carrier employees whose sole contact with explosive materials is during transportation are excepted from ATF's background check requirements. While we welcome this development, ATF's attempt to substantively change a rule without notice and comment in the Federal Register is a violation of the Administrative Procedure Act. Until ATF, in fact, amends its regulatory requirement, motor private carrier drivers transporting explosives must follow the dictate of the rule.

24 8 U.S.C. 1101(a)(3), "The term 'alien' means any person not a citizen or national of the United States."

25 68 FR 23870 (May 5, 2003).

26 49 CFR 383.31(b).

likewise, require drivers with security disqualifications to notify their current employers, as well as their licensing State authority.

Issues of Concern

ATF rules provide that "drivers" complete a form to establish their credentials authorizing them to transport explosives in commerce and to establish a custody trail of the explosives transferred to drivers for transportation. This form – form 5400.8 – has been revised three times since January. While the current version is a significant improvement over either of the two earlier versions, the form still asks the driver to declare personal information that in some jurisdictions may be a violation of privacy laws and still presents opportunity for identity thief since the information collected is turned over to a private entity, not a government agency.[27] More importantly, ATF's release of this revised form, notwithstanding TSA's implementation of the USA Patriot Act rules, shows that the Bureau continues to assert its jurisdiction over aspects of the transportation of explosives. If ATF has jurisdiction to require this form, there is nothing that precludes the Bureau from revising the form again and reinstating or adding information requirements that are not acceptable or appropriate for transportation. TSA needs to clarify that the only appropriate credential for a hazmat driver to present is a valid commercial drivers license, which if the shipment requires placards, should include a hazardous materials endorsement. Furthermore, the notion that the 5400.8 form establishes a custody trail is without merit. "Drivers" are not the only persons who will be authorized to possess explosives as they are transported in commerce. If such a tracking document were needed, DOT under its FHMTL authority to impose shipping paper requirements would be the appropriate federal entity to determine the necessity and scope of such rules.

TSA's list of disqualifying criminal offenses includes "improper transportation of a hazardous material." TSA assesses the security risk from this disqualification so severe that individuals convicted of such criminal offenses are not eligible for the relief extended to perpetrators of other crimes after seven years from the date of the conviction or five years after release from incarceration. TSA has used federal standards to define some disqualifying offenses.[28] However, TSA's rule contains no similar definition for "improper transportation of a hazardous material" offense. Many States use standards to charge and prosecute persons for offenses that could be described as "improper transportation of a hazardous material" which vary from federal standards. States have also been known to enforce standards that DOT has subsequently preempted. We believe this standard, without further refinement, will be the source of unintended mischief. We strongly recommend that TSA modify this standard to "convictions under 49 U.S.C. 5124 for improper transportation of a hazardous material."

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[27] Other than a requirement to retain 5400.8 forms for five years, ATF has no requirements pertaining to the handling of the forms during that time or the disposition of the forms at the end of the period.

[28] 49 CFR 1572.103(b), Crimes "involving a severe transportation security incident", 18 U.S.C. Chapter 113B (terrorism) and 18 U.S.C. 1961 (RICO Act) convictions.

TSA intends to give notice to States when an initial review indicates that a driver may be prohibited from possessing a CDL hazmat endorsement.[29] Although TSA believes that it would be premature to revoke the hazmat endorsement based on an initial review, it grants States leave to "take whatever action [deemed] appropriate … until TSA has issued its final determination."[30] We believe such state discretion could result in unequal treatment of persons depending on who is their CDL issuing state authority. While IME does not object to notification of States following an initial review, we do not believe that States should be able to act unilaterally pending a final TSA determination.

We, better than some, appreciate the speed with which TSA/DOT have moved to "regulate" security standards of transportation workers. Regrettably, this haste has put TSA in a position of releasing a rule without closure on how the application process, fingerprint collection, and the periodic renewal of CDLs with hazmat endorsement is going to work given the variations among state licensing programs. If legislative changes are needed at the state level within the 180-day window set by this IFR, this may not be possible. Some state legislatures do not even meet annually. We do believe that TSA is on the right track with its outreach to state motor vehicle administrators and to the National Crime Prevention and Privacy Compact Council. In the short-term, perhaps the solution is to continue to rely on a name-based security check protocol until TSA can be assured that a fingerprint-based clearance system is in place "flexible enough to accommodate all of the unique characteristics of the State processes, and the mobile nature of the workforce, and that is cost-effective for the drivers, employers, and governmental agencies."[31]

Outstanding Issues

As TSA knows, its rules do not address domestic railroad workers who are in security-sensitive positions. TSA understands the intermodal nature of hazardous materials transportation. There will be no end to the self-imposed embargos of Class 1 materials until DOT/TSA issue security rules for rail hazmat employees that specifically address the disqualifications at 18 U.S.C. 842(i). ATF's foray into the regulation of Class 1 materials in transportation in commerce has, at least in the short term, undermined security. By eliminating rail shipments, our industry is deprived of a means of transportation that would be extremely difficult to divert for criminal/terrorist purposes and has not been used as a vehicle to deliver terror. We understand that DOT/TSA are moving expeditiously to issue rules covering security risks presented by employees operating in the rail mode.

We must respectfully remind TSA that its IFR applicable to Canadian Class 1 material shipments contains a number of deficiencies. These deficiencies, which IME has addressed in comments to the docket, concern Canadian-authorized drivers carrying shipments from the United States to Canada, shipments to and from Mexico, aliens from other countries involved in export operations from the United States, and other matters addressed in this comment.[32] We understand that TSA's stalled effort to negotiate an equivalent standard with the

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29 68 FR 23861 (May 5, 2003).
30 68 FR 23861 (May 5, 2003).
31 68 FR 23857 (May 5, 2003).
32 Comments to docket TSA-2003-14421 from Cynthia Hilton, IME, March 6, 2003.

Government of Canada stems from Canada's resistance to a fingerprint-based clearance protocol. Whatever the end result, it is not appropriate to hold United States citizens to a higher security clearance standard than that imposed on aliens seeking the privilege to engage in commerce in the United States. Again, we urge TSA to promptly address these issues and release final rules.

ATF has said that when DOT issues background requirements for other classes of transportation workers that ATF, with DOJ, will examine the standards to see if they are sufficient to effect the transportation exception of 18 U.S.C. 845(a)(1).[33] We understand that ATF, and DOJ, participated heavily in the crafting of this and other USA Patriot Act rulemakings, and that these agencies agree that these rules are sufficient to effect the FEL transportation exception for assessing security risks of persons engaged in the transportation in commerce of explosives. While we welcome ATF/DOJ's willingness to relinquish FEL authority over transportation in commerce, we question ATF/DOJ's interpretation of its authority in a manner allowing it to withhold the effect of the transportation exception once DOT/TSA act pending a determination of regulatory sufficiency. FEL provides that the transportation exception be effected when any aspect of the transportation of explosive materials is regulated by DOT and its agencies.[34] The only legislative history on the provision states that FEL "is not meant to affect aspects of the transportation of explosive materials regulated by [DOT]."[35] (Emphasis added.) FEL does not say that the exception is effective only after approval of the ATF or DOJ. The notion that DOJ/ATF are the arbiters of the sufficiency of DOT/TSA rules for purposes of the FEL transportation exception has implications for this and future rulemakings. This rule, the other companion USA Patriot Act rules, and any future rule affecting explosives in transportation potentially invite DOJ/ATF oversight. It also raises the possibility that DOJ/ATF could revoke the FEL transportation exception if they perceive that circumstances have changed and that DOT/TSA have not moved quickly enough to address new threats. When DOT, the government's regulatory authority over transportation in commerce, determines that it has exercised its authority and occupies a field of commercial transportation regulation, its determination should be final.

Conclusion

The transport of hazardous materials, including explosives, is a multi-billion dollar industry that employs millions of Americans. Explosives are a small and essential component of this vital enterprise. This commerce has been accomplished with a remarkable degree of safety and security, in large part, because hazardous materials in transportation in commerce are highly regulated by TSA/DOT under a uniform regulatory framework authorized and demanded by FHMTL.

We support federal background checks of persons engaged in the transportation of hazardous materials. We believe that DOT/TSA, not ATF, are the appropriate federal entities with the expertise to effectively secure the commercial transportation of hazardous materials, including explosives, against terrorist threats. ATF's authority, when it is permitted to be

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33 68 FR 13775 (March 20, 2003).

34 18 U.S.C. 845(a)(1).

35 H. Rep. 91-1549, page 70.

exercised in transportation, can only narrowly reach to explosives – a commodity less than 0.1 percent of all commerce. An explosives-only security clearance scheme for transportation workers cannot be justified. TSA's rules to implement the hazmat driver provisions of the USA Patriot Act have properly assessed the risk presented by explosives, and other hazardous materials, when transported in commerce, and struck an appropriate balance that manages risk in a flexible and cost-effective manner.

Thank you for your attention to these issues.

Sincerely,

Cynthia Hilton
Executive Vice President